IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1780 OF 1993

WITH

L.A.R. NO. 3 OF 1997

Vijay Enterprises .... Plaintiffs.

vs.

Gopinath Koli

& Ors. .... Defendant.

Ms. S.M. Dandekar for SLAO.

Mr. C.M. Korde with Bhagat i/by Vasant & Co.
for claimant nos. 1, 3 to 8, 10 to 17,
19 to 22 in LAR and for Defendant no.1.
3 to 6, 8, 10 to 27 in Suit No.1780/93.

Mr. R.C. Shah with Mr. B. Dandekar for
Claimant No. 2.

Mr. A.Y. Bookwala with Mr. V. Naik
i/by K. Dalal & Co. for D. Nos. 29 to 32.
in Suit No. 1780/93.

Mr. B. Dandekar for Plaintiffs in S. No. 1780/93.

CORAM : S.U.KAMDAR, J.

DATE : 21st NOVEMBER, 2005.

ORAL JUDGMENT :

1. Both the suit and the land reference has

been directed to be heard together and accordingly the same are placed before me for final disposal.

2. The suit has been filed by M/s. Vijay Enterprises inter alia seeking specific performance of an agreement for sale dated 6.7.1984 and three agreements for sale all dated 29.4.1985 in respect of the land which is more specifically described in Exhibit 'A' to the said suit. As a consequential relief on decreeing the suit it has also been claimed that the plaintiff is entitled to compensation as awarded by the Special Land Acquisition Officer under award dated 3.11.1995 in LAQ No. 369/2.

3. The land acquisition reference has been filed by the SLAO in view of a diverse claim for compensation made by the parties in respect of the land under acquisition. The said reference is filed under section 30 of the Land Acquisition Act inter alia calling upon this Court to determine the entitlement of various claimants on the basis of conflicting claim of title in respect of the said property. In view of the aforesaid position, the present suit for specific performance has been tagged along with the said land acquisition reference. In my opinion, the decision in the suit would by and large decide the reference itself save and except on a few points because the title in

respect of the property would be determined in the said suit. Parties have led common evidence both for suit as well as Land Acquisition Reference.

4. The parties in the suit are also three divergent set of claimants who have put forward before me their claims in respect of the suit property. The defendant no. 1 to defendant no. 27 are the members of Koli families and are claiming right, title and interest in respect of the suit property as an owner by virtue of adverse possession. The plaintiff in the suit is claiming to have purchased the suit property from the defendant no. 1 to 27 under the aforesaid four diverse agreements and is claiming to be entitled to the specific performance of the said four agreements and consequentially entitled to be declared as owner in respect of the said property. The defendant no. 29 is also claiming title in respect of the property. The defendant no. 29 is claiming interest in part property on the basis of the agreement executed by him with the plaintiff and in respect of another part of the suit property claim is made on the basis of the agreement executed by the defendant no. 29 with defendant no. 1 to 27. Thus, as far as defendant no. 29 is concerned, he is claiming title in the property in respect of the part from the plaintiff and in respect of another part of the land from defendant nos. 1 to 27.

Further, defendant no. 29 is holding only agreement for sale and has admittedly filed no suit for specific performance of any of the alleged agreement executed in his favour.

5. Some of the material facts which are relevant for the purpose of determination of the aforesaid conflicting claim of title are briefly enumerated are as under :-

6. The present suit is filed in respect of four different plots of land covered by the four different agreements. The land involved in the present suit is survey no. 101 Hissa No. 2 (part), CTS no. 702 (part) admeasuring 2 acres 2 1/2 gunthas i.e. 10101 sq years = 8448 sq. mtrs. survey no. 53 Hissa no. 1, CTS No. 700 (part) admeasuring 1684 sq. mtrs, survey no. 54, Hissa No. 3 (part) CTS No. 698 (part) admeasuring 546 sq., mtrs., and survey no. 101 Hissa No. 2 (part) CTS No. 702 (part) admeasuring 6761 sq. yards = 5633 sq. mtrs. These four pieces and parcels of land are the subject matter of the suit in the present case. Only part of the said land has been acquired and was a subject matter of acquisition in respect of which LAR No. 3 of 1997 has been filed.

7. The defendant no. 1 to 27 are claiming title in respect of the property situated at the

aforesaid address being village Nahur, Mulund West, Bombay - 400 080 totally admeasuring 18631.25 sq. yards = 15575 sq. meters or thereabout as described in the earlier para hereto. The defendant no. 1 to 27 are claiming that they are the persons in possession for more than 12 years and thus by virtue of the said possession, they have become owners by doctrine of adverse possession. Originally one Bhaidas Dharshibhai Bhuta was owner in respect of the said property. Part of the said property was leased out by the said Bhaidas Dharshibhai Bhuta in favour of one M/s. Aurum Pharmaceuticals Pvt. Ltd., and M/s. Balaji Construction Corporation. M/s. Balaji Construction Corporation has in turn sub-let the part of the property to one Amubhai Velji Sethia who granted development rights in favour of one M/s. Mahavir Land Development Corporation. The said Shri Bhaidas Dharshibhai Bhuta died on 18.7.1981 leaving behind his last will and testament dated 23.10.1978 thereby appointing Shri Damodardas Bhaidas Bhuta and Shri Vasantrai Bhaidas Bhuta as the executors and trustees of the said will and testament.

8. One Laxman Mahadev Kakad was claiming to be the cultivator in respect of the large portion of the land prior to his death on 26.1.1973. By his last will and testament dated 17.5.1972 the said Laxman Mahadev Kakad bequeathed the large portion of

the said property to his adopted son namely, Gopinath Mahadev Koli, defendant no. 1 in the suit. The defendant nos. 2 to 27 are the family members of the said Gopinath Mahadeo Koli and are also claiming to be in possession of the said property.

9. It is the case of the plaintiff that these plots of land which is the subject matter of the suit were purchased by the plaintiffs under four different agreements of sale. The first agreement was executed on 6.7.1984 and remaining three agreements for sale were executed on 29.4.1985 between defendant no. 1 to 27 and the plaintiff herein. Putting all the four agreements together the plaintiff is claiming to have purchased 16,925.25 sq. yards of land = 14164 sq. mts. out of the total area of the suit property of 18,631.25 sq. yards = 15,575 sq. mts. of the said property.

10. Under the first agreement for sale dated 6.7.1984 which is executed by and between the plaintiff and defendant no. 1 to 27, a portion of the land bearing survey no. 101, Hissa No. 2 (part) CTS No. 702 (part), admeasuring about 6761 sq. yards = 5653 sq. mts. is supposed to have been agreed to have been sold by defendant nos. 1 to 27 on various terms and conditions set out therein. According to the plaintiffs, under the terms and conditions of the said agreement it was

inter alia provided that defendants no. 1 to 27 shall sell the said property to the plaintiff at the price of Rs. 205 per sq. yard, aggregating to Rs. 13,86,005/-. According to the plaintiffs, under the said terms price was payable by the plaintiff to defendant nos. 1 to 27 subject to the deduction of the amount payable by the plaintiffs to the estate of the said erstwhile owner Bhaidas Dharshibhai Bhuta and subject to the satisfaction of the claim of the lessees of the said plot of land, namely, M/s. Aurum Pharmaceuticals Pvt. Ltd., According to the plaintiffs, the total price was to be computed after deducting the amount to be paid by the plaintiff to these parties towards satisfaction of their claim so as to obtain marketable title of the said property. It is the case of the plaintiffs that under the said first agreement the original earnest money paid was Rs. 1,20,000/- but thereafter diverse amounts are paid from time to time. It is also the claim of the plaintiffs that in accordance with the terms and conditions of the agreement the plaintiff has satisfied the claim of Bhaidas Bhuta as well as the claim of M/s. Aurum Pharmaceuticals Pvt. Ltd., and plaintiff has paid the said M/s. Aurum Pharmaceuticals Pvt. Ltd., a sum of Rs. 6,68,880/- for relinquishing their right, title and interest as lessee in respect of the said property. It is also the case of the plaintiff that the plaintiff has also paid a sum of

Rs.12,49,381/- to the defendant nos. 1 to 27 over and above satisfying the claim of the said Bhaidas Bhuta and M/s. Aurum Pharmaceuticals Pvt. Ltd., In respect of the said agreement dated 6.7.1984 according to the plaintiff the defendant nos. 1 to 16 and 18 to 22 also executed an irrevocable power of attorney in respect of one Mr. Harshad Sethia and Dinesh K. Shah being the partners of the firm of the plaintiff irrevocably authorising them to obtain various permissions and obtain sanction of the plan from the Corporation for the purpose of construction of the building on the said plot of land. According to the plaintiff, in view of the fact that the plaintiffs have made substantial payments in respect of the said agreement dated 6.7.1984 in respect of the properties described therein and is for convenience sake known as plot "A' the plaintiffs are entitled to specific performance since he has complied with all his obligations under the said agreement and it is the defendant no. 1 to 27 who have committed breach of their obligations to convey the property to the plaintiff herein and thus the present suit is filed by the plaintiffs for specific performance of the suit agreement dated 6.7.1984 and various other consequential reliefs. It is the case of the plaintiffs that the plaintiffs are in possession of the said plot in part performance of the said agreement dated 6.7.1984 and in support of the

aforesaid contention the plaintiff has relied upon a possession clause in the said agreement, the possession receipt and also the execution of power of attorney permitting the plaintiff to carry on construction on the said plot of land.

11. In so far as this agreement is concerned, the defendant nos. 1 to 27 has raised various defences and has contended that the plaintiff is not entitled to specific performance of the said agreement dated 6.7.1984. Firstly, it is the case of the plaintiff that the said agreement is not valid and binding because the price in the said agreement is filled in subsequently and is not in consonance with the agreement between the parties. Secondly, that the terms and conditions of the agreement are harsh, unequal and amounts to unequal bargain and, therefore, the said agreement is not valid and binding on defendant nos. 1 to 27. It has been contended that the defendant no. 1 to 27 are illiterate and uneducated persons and, therefore, unconscious bargain has been striked by the plaintiff with the said defendant nos. 1 to 27.

12. Alternatively it has been contended that the plaintiff is in breach of the terms and conditions of the said agreement because they have not made the payment of the price as stipulated under the agreement and thus the defendant nos. 1 to 27 are

not bound to specifically perform the said agreement for sale in favour of the plaintiff and they are entitled to refuse performance and the plaintiff cannot seek a decree for specific performance from this Court.

13. In so far as the other three agreements are concerned, the case of the parties before me has been slightly complex and different than that of the agreement for sale dated 6.7.1984 in respect of Plot A of the suit property. These three agreements dated 29.4.1985 is in respect of plot of lands for convenience sake identified as plots B, C and D and also forming part of the subject matter of the suit property described hereinabove. These three agreements are produced by the plaintiff in the course of evidence. The defendants have also produced their three agreements dated 29.4.1985. Both the set of documents i.e. three agreements produced by the plaintiff as well as three agreements produced by the defendant bear the same date and are duly executed by both the parties. However, both agreements differ substantially in respect of the terms and conditions of the agreement for sale of the said properties. A question arises in the present case which are the three agreements this Court must accept for the purpose of specific performance, if the Court is inclined to grant the said relief, whether the agreements produced by the

plaintiffs herein or the agreements produced by the defendants. Not only that, a further question arises in the present case for determination that whether the plaintiff is entitled to a specific performance of the said three agreements and whether the plaintiff has complied with the terms and conditions of the said agreement. The plaintiffs are relying upon three sets of agreements dated 29-4-1985 of which the terms and conditions inter alia provide that price will be paid in respect of the said three plots of land at the rate of Rs. 205/- per square yard. Each of the three agreements are identical in terms and conditions which are produced by the plaintiff. The said pertains to the various plots of land which are already set out hereinabove. The price fixed in the said agreements for plot 'B' is at Rs. 205/- per square yard and the total consideration is Rs. 3.41.120/-. In respect of the second agreement which is for the plot of land being "C" which is of around 1966.25 sq. yards = 1664.02 sq. meters the price was calculated at the ate of 205/- per sq. yard totally aggregating to Rs. 4,03,081.25 and the third agreement dated 29.4.1985 is in respect of 6534 sq. yards = 5463.21 sq. mts. being Plot "D" and the price is fixed at the rate of Rs. 205/- per sq. yard totally aggregating to Rs. 11,76,308/-. It is an admitted position that under the aforesaid three agreements, the plaintiff has paid only the earnest

money and the balance payment has not been paid by the plaintiffs to the defendant nos. 1 to 27.

14. In respect of the land covered by the aforesaid four agreements, the plaintiffs further entered into an agreement with Balaji Construction Company to acquire their leasehold right to the said property so as to make the said property marketable. According to the plaintiffs they have paid an aggregate sum of Rs. 2,55,000/- to the third party Balaji Construction Company under the terms and conditions of the said agreement. It is the further case of the plaintiffs that the plaintiffs have also entered into an agreement with one Amubhai Velji Shethia who was claiming to be the sub-lessee in respect of the portion of the said plot of land and the plaintiffs have paid to him a sum of Rs. 1,10,000/- to satisfy his claim. It is his further case that the plaintiffs have taken various steps and expended large sums of money in order to settle in all claims of the various parties interested in the said four plots and acquired the interests of the various parties therein. It is the case of the plaintiffs that the plaintiffs have been put in possession in respect of the first agreement i.e. dated 6.7.1984 on 26.3.1985 while in respect of the remaining three plots he has been put in possession on 13.3.1985.

15. Further, in pursuance of the agreement and on acting upon the said agreements, according to the plaintiffs the defendants filed a suit at the instance of the plaintiffs being Suit No. 340 of 1987 in this Court. The said suit was filed against the heirs and legal representatives of the said Bhaidas Bhuta and the said Aurum Pharmaceuticals Pvt. Ltd., being the lessee of the said land. Balaji Construction Corporation was also impleaded as party defendant being defendant no. 9 in the said suit. It is the case of the plaintiffs that in the said suit a consent decree was obtained on 22.7.1991 and the said suit No. 340 of 1987 was amicably settled and the plaintiff bought over the right, title and interest of each of the said persons who were claiming interest therein and extinguished their claim by making payment of large amounts to the various parties. It is the further case of the plaintiffs that to the said consent terms the defendant no. 1 to 27 are also the confirming parties and by way of execution of the said consent terms they confirmed the aforesaid four agreements in respect of the suit property. It is the further case of the plaintiffs that thereafter the U.L.C. proceedings were in progress and the plaintiffs as a power of attorney holders of defendant nos. 1 to 27 followed up the said ULC proceedings and the ULC authority by its order dated 13.7.1992 passed under section 8 (4) of the U.L.C.

Act exempted the said land from acquisition under the provisions of the U.L.C. Act. It is the case of the plaintiffs that in the process of making the property marketable all these steps were taken and the plaintiff has already spent more than Rs. 20 lacs in respect of the said four plots, out of which the defendant nos. 1 to 27 have been paid an aggregate sum of Rs. 4,78,000/-

16. It is the further case of the plaintiffs that the plaintiffs have in turn executed two agreements with defendant no. 29 on 12-2-1985 and 28.7.1986 and have agreed to sell the first and second plot i.e. Plot B and C to the defendant no. 29 for the price of Rs. 47,24,000/- and have received part payment of Rs. 8,25,000/-. It is the further case of the plaintiffs that under seven different agreements, three being dated 10.10.1987, and other three being dated 3.12.1987 and one dated 26.4.1988 the plaintiff has agreed to assign, sell and/or transfer all the plaintiffs' right, title and interest in the said third and fourth plots i.e. Plots Nos. C and D to the defendant no. 29 for an aggregate purchase price of Rs. 37,50,000/-. Thus, the defendant no. 29 is claiming the part of the said property being Plot known as C and D through the plaintiffs. It is the case of the plaintiffs that in respect of the aforesaid agreements the plaintiff has received part of the purchase price

from the defendant no. 29.

17. The plaintiff has stated in the said suit that on 11.12.1992 the defendant nos. 1 to 27 issued a public notice purportedly terminating the power of attorney dated 26.3.1985 and thus, the plaintiffs realised that the defendant nos. 1 to 27 are seeking to back out from the terms and conditions of the said agreement. Further, by an Advocate's letter dated 30.1.1993 the plaintiff forwarded a cheque for Rs. 3 lacs in part payment to the defendant nos. 1 to 27 which the defendant nos. 1 to 27 refused to accept and consequently the plaintiffs were required to file the present suit for specific performance of all the four agreements as against defendant nos. 1 to 27.

18. Pending the suit for specific performance in this Court certain further developments took place which are relevant and material for the present case as I am also required to decide LAR No. 3 of 1997. The said further events are briefly set out as under :-

19. On 28.9.1993, the Government of Maharashtra in exercise of power under section 126 the Maharashtra Regional Town Planing Act, 1966 (hereinafter referred to as the MRTP Act) read with section 6 of the Land Acquisition Act issued a

notification for acquisition of a portion of the land bearing CTS No.54/3 and 101/2 corresponding to CTS No. 698-A and 702(A) admeasuring 1762 sq. meters for the public purpose for D.P. Road for Municipal Corporation of Greater, Mumbai. The said public road is popularly known as Goregaon-Mulund link road. In pursuance of the said notification, acquisition proceedings were commenced and ultimately culminated by passing an award under section 11 of the Land Acquisition Act, 1894 on 3.11.1995. Thus, the aforesaid land has been acquired by the State Government in exercise of State power of compulsory acquisition. The claimants who are plaintiffs, defendant no. 1 to 27 as well as defendant no. 29 have claimed the F.S.I. / T.D.R. in lieu of monetary compensation. Thus, ultimately no amount of compensation was paid though it was so declared being an amount of Rs. 1,65,82,966. In view of the diverse claims of ownership in respect of the said property, the SLAO has filed a section 30 reference in this Court which is numbered as LAR No. 3 of 1997.

20. Pursuant to the aforesaid events which have taken place, the plaintiff has amended the plaint and has also staked claim on the compensation amount which has been awarded by the Special Land Acquisition Officer and has contended that the plaintiff alone is entitled to the said amount of

compensation and not the defendants no. 1 to 27 and/or defendant no. 29. This claim has been denied by defendants no. 1 to 27 and 29 by filing written statement in this Court.

21. The defendants nos. 1 to 27 has in their written statement inter alia contended that the agreement is not legal and valid as it is executed under duress and without any proper knowledge and understanding of the agreements as the defendants nos. 1 to 27 were illiterate and uneducated. It has ben contended in the written statement that the defendant nos. 1 to 27 have been subjected to unequal bargain and it is a totally one sided agreement obtained by the plaintiff in respect of the said property. In so far as the third agreement dated 29.4.1985 is concerned, additional contentions are raised in the written statement that the agreement which has been produced and proved by the plaintiff is not the correct agreement which has been executed by and between the plaintiff and the defendants but the correct and true agreement has been produced by the defendants which inter alia indicates a different terms and conditions including the payment of price. It has been contended that the plaintiff is in breach of the terms and conditions of the said agreements by non-payment and thus the plaintiff is not entitled to specific performance and consequently not entitled to any

compensation as awarded by the Special Land Acquisition Officer. It has also been denied that the plaintiff was put in possession in respect of the said premises.

22. The defendant nos. 1 to 27 has filed a supplementary written statement dated 8.8.2002 giving reply to the averments made in respect of the subsequent acquisition of the portion of the land being CTS 101 (part) and CTS 702 (Part) and has contended that the plaintiff is not entitled to any specific performance and as such not entitled to any claim of any amount of compensation. It has been alternatively contended by the defendants that the specific performance has become impossible or frustrated since the subject matter of the property is no more available and thus under section 12 (3) of the Specific Relief Act the plaintiff is not entitled to claim any relief for specific performance in respect of the said plots of land or to press their claim for compensation under the Land Acquisition Act. The defendant no. 29 has also filed their written statement and has resisted the suit. In nutshell, the defendant no. 29 is also claiming the title in respect of the property under the said agreements which are executed by and between the defendant no. 1 to 27 and the defendant no. 29. The defendant no. 29 is also claiming interest in the property by virtue of two separate

agreements executed with the plaintiff. The defendant no. 29 is also claiming to be in possession in respect of the suit property and according to defendant no. 29, the plaiting was never put in possession as claimed in respect of the said property. The defendant no. 29 is also claiming share in compensation as an owner in respect of the portion of the said property by virtue of the agreements of sale executed by the plaintiff and defendants nos. 1 to 27. They alternatively also have claimed right in the share to the compensation by virtue of their mere possession of the suit property and thus a 'person interested'. It has been contended that the defendant no. 29 being in possession is a person interested under section 9 of the Land Acquisition Act and as such they are entitled to share in the compensation in the aforesaid amount.

23. Upon these pleadings the Court framed the issues. The said issues are as under :-

1. Whether the Plaintiffs have any cause of action against the defendants ?

2. Whether the suit is barred by the law of Limitation?

3. Whether the Plaintiffs prove that the Plaintiffs firm is registered under the Indian Partnership Act, 1932?

4. Whether the Plaintiffs are required to give up their claims in respect of the acquired lands before in Land Acquisition Reference No. 3 of 1997 before proceeding with the suit for specific performance of the remaining lands in view of the provisions of Section 12 of the Specific Relief Act ?

5. Whether the Plaintiffs prove that the suit agreements were executed for the benefit of the minor Defendant Nos. 24 to 27 ?

6. Whether the Plaintiffs prove that they have paid to the Defendants No. 1 to 27 a sum of Rs. 13,44,381/- towards the price payable under the first Agreement dated 6th July, 1984 as per particulars Ex. G to the plaint?

7. Whether the Plaintiffs prove that in pursuance of the Agreement dated 6th July, 1984 and 26th March, 1985, the Plaintiffs were put in possession of the First Plot of land described in Ex. C to the plaint as stated in para 13 of the Plaint?

8. Whether the Plaintiffs prove that in pursuance of the three Agreements all dated 29th April, 1985 the Plaintiffs were put in possession of the second, third and fourth plots of land described in Exh. J, M and N to the Plaint?

9. Whether the Plaintiffs prove that in pursuance of the Agreement dated 6th July, 1984 the Plaintiffs have by two separate Agreements dated 6th July, 1984 acquired the right, title and interest of (a) the estate of Bhaidas Bhuta and (b) Aurum Pharmaceuticals Private Limited in the first plot of land described in Exhibit C to the plaint as stated in paras 10 and 11 of the Plaint?

10. Whether the Plaintiffs were at all times ready and willing to perform the suit agreements?

11. Whether the Plaintiffs prove that by Agreements dated 12th August, 1985 and 28th July, 1986 Plaintiffs have agreed to sell to Defendant No. 28 their right, title and interest in the first and second plot of land described in Exhibits C and J to the Plaint for Rs. 47,24,000/- (Rupees Forty Seven Lac Twenty Four Thousand only) and received part payment of Rs. 8,25,000/- (Rupees Eight Lac Twenty Five Thousand only) from Defendant No. 28 as stated in para 28 of the

Plaint?

12. Whether the Plaintiffs prove that by seven Agreements dated 10th October, 1987, 10th October, 1987, 10th October, 1987, 3rd December, 1987, 3rd December, 1987, 3rd December, 1987 and 26th April, 1987 the Plaintiffs have agreed to sell their right, title and interest in the third and fourth plot of land described in Exhibits "M" and "P" to the Plaint to Defendant Nos. 29 to 32 for Rs. 37,50,000/- (Rupees Thirty Seven Lac Fifty Thousand only) and received Rs. 11,30,000/- (Rupees Eleven Lac Thirty Thousand only) on account from them as stated in paras 29 and 30 of the plaint?

13. Whether the Plaintiffs prove that purported revocation of irrevocable Power of Attorney by Defendant Nos. 1 to 27 is null, void, bad in law and not binding on plaintiffs as stated in para 41 of the Plaint ?

14. Whether Defendant Nos. 1 to 27 prove that the Agreements of which duplicates were furnished and in possession of Defendants are the genuine Agreements entered into between Plaintiffs and Defendant Nos. 1 to 27 as stated in paras 1 and 12 of the Written Statement of Defendant Nos. 1 to 27 ?

15. Whether the plaintiffs prove that there was an agreement between Harshad Shetna of M/s. Vijay Enterprises and Gopinath Koli and Motiram Koli representing Koli Group to pay an aggregate amount of Rs. 3,00,000/- on receipt of NOC from competent Authority under ULC as stated in para 35 of the plaint and exh. X to the plaint ?

16. Whether the Defendant Nos. 1 to 27 prove that the Plaintiffs have committed breach of the suit Agreement as stated in para 4 of their Written Statement ?

17. Whether the Defendant Nos. 1 to 27 prove that they have terminated the suit Agreements as stated in para 5 of their Written Statement ?

18. Whether Plaintiffs prove that the Agreements between Defendant Nos. 1 to 27 and Defendant Nos. 29 to 32 are contrary to suit Agreements between the Plaintiffs and Defendant Nos. 1 to 27 as stated in para 40 of the Plaint ?

19. Whether the plaintiffs are entitled to specific performance of the suit agreements being Agreement dated 6th July, 1984 Exhibit "D" to the Plaint and three Agreements all dated 29th April, 1985 being Exhibits "K", "N" and "Q" to

the plaint ?

20. What reliefs/order ?

24. On the basis of the aforesaid issues, the matter was tried and oral evidence was led by the parties and the brief analysis of the oral evidence can be summarised as under :-

25. The Plaintiffs have produced one witness i.e. Harshad Sethia, a partner of the plaintiff firm. He has deposed that under the agreement dated 6.7.1984, the plaintiff has made diverse payment to the defendant nos. 1 to 27 and also for and on behalf of defendant nos. 1 to 27 to various parties on different dates. In so far as the payment of Rs. 12,64,381/- is concerned, there is no dispute between the parties. He has also stated in his evidence that the plaintiff filed a Suit No. 340 of 1987 in this Court in the name of defendant nos. 1 to 27 against Aurum Pharmaceuticals Private Limited, Bhaidas Bhuta and Balaji Construction Corporation and the plaintiff paid the court fee of Rs. 15,000/- on account of the plaintiff in the said suit. It has been also stated that the plaintiff has paid all these amounts of advocates fees and he has claimed credit against the consideration payable by him under the terms and conditions of the agreement for sale dated 6.7.1984. The plaintiff

has thereafter deposed in details the amounts of cheques paid and the diverse payments effected by the plaintiff to the defendant nos. 1 to 27. In paragraph 12 of his evidence in chief it has been deposed by the plaintiff, that the plaintiff was put in possession on 26.3.1985 of the plot which is covered under the agreement dated 6.7.1984 as recorded in the possession letter dated 26.3.1985. On the basis of the said possession letter, the plaintiff has claimed that the plaintiffs are in possession in respect of the property covered under the agreement dated 6.7.1984. In so far as the three agreements dated 29.4.1985 are concerned, a detailed examination in chief is led in paragraph 15 of the evidence and he has deposed that the three agreements produced by the plaintiff are the true and correct agreement though it has been admitted in the course of evidence by him that he has filled in the blanks in his own hand writing. However, he deposed that such filing in the blanks were carried out by him prior to the execution of the agreement and the defendant nos. 1 to 4 have duly acknowledged the same. It has also been contended that the price agreed to under the said agreements is Rs. 205/- per sq. meter. In respect of the said three agreements also the plaintiffs are relying upon a possession letter dated 13.11.1985 supposed to have been executed by the constituted attorney for defendant nos. 2, 6, 7, 9 and 11 and

the said letter has been produced. Thereafter the plaintiff has deposed about the payments which are effected by him to Bhaidas Bhuta and M/s. Aurum Pharmaceuticals Pvt. Ltd. It has been stated by him that the plaintiff has paid Rs. 2,55,000/- and the details thereof are furnished. It has been further contended that Rs. 1,10,000/- is paid to one Amubhai Velji Shethia who was also claiming to be the sub-lessee of the said plot of land and the details thereof are furnished. It has been deposed further that the plaintiffs have paid a large amount of money and accepted the aforesaid amounts in respect of the said three agreements dated 29.4.1985. It has been also deposed that the plaintiffs have taken various steps such as prosecution of ULC proceedings and obtaining the orders of exemption of the said land from ULC. It has been further deposed that the plaintiffs tendered the sum of Rs. 3 lacs to the defendants nos. 1 to 27 which were the balance due and payable, according to the plaintiffs, in respect of the four agreements but the defendants refused to accept the same and thus the plaintiffs were always ready and willing to comply with his part of obligation. It has been further deposed that the three agreements for sale dated 29.4.1985 were also filed with the Income-tax authorities under section 269 AB of the Act and necessary form No.37 EE was also filed for the same which also indicates that

the agreements were accepted and acted upon as well as it also indicates the correct agreement and the correct price being Rs. 205 per sq. yard. Thereafter it has been deposed that the plaintiffs was dragged to this Court for filing a suit because of the wrongful termination of the power of attorney executed by defendant nos. 1 to 27 in favour of the partners and/or representatives of the plaintiffs and as such the cause of action arose to seek specific performance of the said agreements.

26. The Plaintiff has filed an affidavit in evidence dated 28.3.2003 inter alia reiterating what is mentioned in the plaint and further claimed that the plaintiff has complied with large part of the obligation by making payment of large amount of money under the terms and conditions of the said agreement. The plaintiff further has led evidence to prove that the plaintiff paid a sum of Rs. 6,68,880/- to M/s. Aurum Pharmaceuticals Pvt. Ltd., and details of the cheques are given. It has been further deposed that a sum of Rs. 1 lac over and above of the said amount was paid to M/s. Aurum Pharmaceuticals Pvt. Ltd., through their Advocates M/s. Mathubhai Jamietram & Madan from Current Account No. 109 maintained by the plaintiffs with the Bank of Maharashtra, Andheri (West) Branch. It was on the aforesaid basis contended that the plaintiff has acquired the right, title and interest

of M/s. Aurum Pharmaceuticals Private Limited in the said property in pursuance of the suit agreement for sale of the said property.

27. The plaintiff has been thereafter cross-examined in detail particularly in respect of the three agreements dated 29.4.1985. The plaintiff was cross-examined on an agreement Exhibit D1, D2 and D3 produced by the defendants in the course of the evidence and confronted with the Exhibits P-21 to P-23 being agreements produced by the plaintiff. However, in his cross-examination he has deposed that though it is true that there are two separate sets of agreements but according to him, the documents Exhibits D1 to D3 orally were cancelled and the same were required to be destroyed and it was agreed that only P-21 to P-23 are the documents which were to be acted upon and accepted as the correct agreements. In his cross-examination he has deposed that he was informed by Motiram Koli orally that the documents Exhibits D1 to D3 were not to be acted upon and were to be destroyed. He has admitted that he has filled in the blank in the said agreement but it is his case that he has filled in before execution of the agreement and not subsequently. He has pointed out that there are initials of the defendant also on the said blanks which was accordingly filled in with their consent. He has also accepted that under the three agreements

referred to as P-21, P-22 and P-23 the entire consideration has not been paid to the defendants. He has further denied the suggestion that actual price of the said property is much higher and the agreement does not reflect the correct price. In so far as the possession is concerned, he has once again reiterated that he was put in possession of the said plot and he is in actual and physical possession thereof by virtue of the possession letter executed in respect of the same. The entire amount supposed to have been paid by him is sought to be correlated with the amount payable under the agreement of 6.7.1984.

28. The plaintiffs has in his cross-examination admitted that there were delays in making payments as stipulated under the contract but according to him the time for making payment was extended. It is his contention in his cross-examination that the extension was oral and not in writing. However, he has admitted that there is a substantial delay in making payments of the various amounts. In his cross-examination vis-a-vis defendant no. 29 the plaintiff has deposed that the agreements which are executed by him with defendant no. 29 being Exhibits P-40 and P-41 are subsisting and binding on him. He has also admitted that in the course of the appeal proceedings being Appeal No. 541 of 1993 the Commissioner was appointed to

visit and inspect the suit property and he has made a report in which defendant No. 29 is shown to be in possession of the suit property.

29. On behalf of the defendant Gopinath Mahadeo Koli being defendant no. 1 gave his evidence. According to him, in respect of the said sale of the property there were discussions but the price at which the properties were to be sold were never finalised during the discussion. It is his case that the price was not fixed. However, he contends that the price agreed upon was 285/- per square yard and not Rs. 205/- as claimed by the plaintiff. It was also his case that various blanks were left in the agreements and the same were filled in subsequently by the plaintiff. He has also deposed that the so-called claim of Bhaidas Bhuta, M/s. Aurum Pharmaceuticals Pvt. Ltd. and other claimants claiming interest in the properties were not disclosed to him prior to the execution of the agreement an amount to be disbursed towards their claim. It has been further deposed that the persons who executed the agreements being P-21, P-23, P-25, D1, D2 and D3 were not the authorised persons on behalf of the owners to execute such agreements because some of the parties had not conferred a power of attorney to the said constituted attorney to execute the said agreement. It has been further contended by the defendant nos. 1 to 27 that even

if the said agreement is taken into consideration and if the price of Rs. 205/- is taken into consideration, the plaintiffs have committed breach of the terms and conditions of the agreement by not making payment of the price on its due date and thus the plaintiff is not entitled to specific performance. He has contended that the consent terms were signed in Suit No. 340 of 1987 on express understanding that the defendant nos. 1 to 27 will not be liable for making payment to the said parties and it is the plaintiff who will be liable. It has been contended that the total amount paid to the defendant nos. 1 to 27 under the agreement for sale dated 6.7.1984 is 4,98,000/- and the entire amount as contemplated therein having not been paid the defendant is not liable to perform specifically the said agreement. He has also denied the liability to make payment towards court fees and advocates fee and other claims which are raised by the plaintiff. It has been contended that the defendant nos. 1 to 7 have always been in possession of the said property. In the consent terms in Suit No. 340 of 1987 the clause provides that the defendant nos. 1 to 27 are in possession of the property as owners thereof in letter indicating that as late as in 1991 the plaintiff has admitted that they were never put in possession of the said premises though as and by way of formality the possession letters were executed. It has been

also contended that the plaintiffs have obtained various writings from defendant nos. 1 to 27 without understanding the same as they were illiterate and uneducated. In paragraph 8 of the deposition the defendant nos. 1 to 27 have contended that the plaintiffs are in possession of the said property as owners. It has been contended that the plaintiff is not entitled to specific performance because he has always defaulted in making payments in terms of the agreement. It has been contended that the person who does not abide by the terms and conditions of the agreement is not entitled to specific performance of the said agreement. The defendant no. 1 has been thereafter cross-examined by the plaintiff. The defendant no. 1 was thereafter cross-examined by the defendant no. 29 and in his deposition he has deposed that at the time of visit of the Commissioner in the aforesaid appeal, he was present and he has signed the Commissioner's report. He has also deposed that he has executed the agreement in respect of Survey no. 101 and handed over possession of the said property to defendant no. 29. However, he has denied that after getting possession, the defendant no. 29 has carried out various constructions as claimed by the defendant no. 29. The defendant no. 1 was also cross-examined by the plaintiff. In so far as the security guards and the bills of the same are concerned, the defendant no. 1 has deposed that he

is not in possession of any such bills of security guards. In so far as the agreements are concerned, he has deposed that the correct price was Rs. 285/- and not Rs. 205/-. He has also deposed that the plaintiff was not liable to make payment towards compensation of the third parties in respect of the suit properties. He has however deposed that for execution of the agreement P-21, he was given an authority by other brothers of the Koli family to sign the same. He has also admitted the fact that the payments are tendered by the plaintiff from time to time. There is delay in tendering of the payment. The payment has been accepted by the defendant nos. 1 to 27 without any protest. However, in paragraph 27 of the cross-examination he has deposed that according to him the plaintiffs have committed breaches of various terms and conditions of the agreement in respect of the purchase price as they did not pay full price. He also however admitted that in spite of breach of the terms and conditions of the agreement by the plaintiff, he did not terminate the agreement. However, he states that he orally complained that the price paid in respect of the said property was unreasonable. He has also contended in paragraph 33 in his evidence that the proceedings of the ULC were going on before the ULC. However, he contended that he attended the said proceedings himself by going to the office of the Competent Authority. However, he

admitted that along with him the partner of the plaintiff was also attending the said proceedings before the ULC authority. He denied the suggestion that he had handed over possession pursuant to the agreement of 6.7.1984 on 26.3.1985. He denied that he has received 90% of the consideration amount under the said agreement dated 6.7.1984.

30. This leads me to the last contention of the defendant no. 29. The defendant no. 29 has reiterated his case that there are documents executed in his favour for sale of the property both by the plaintiff and defendant nos. 1 to 27 in respect of the original portion of the property and that he is in possession thereof. He has referred to the report of the Commissioner appointed by the Appeal Court and has claimed actual physical possession of the said property. The report of the Commissioner is proved and marked as Exhibit. There is no substantial cross-examination by anybody of the contents of the report of the Commissioner. In the course of the cross-examination the witness of defendant no. 29 has deposed that under 35 agreements executed by defendant no. 29 and 1 to 27 the purchaser has paid only Rs. 25,000/- and no further amount has been paid. He has also deposed that the agreements are terminated. However, he contends that he was not aware of such agreements till the time of giving the evidence. He has

contended in his evidence that they are claiming compensation in respect of the said acquisition of the property on the basis of the said 35 agreements for sale entered into by defendant nos. 1 to 27 with him. In his further cross-examination he has deposed that the Court Commissioner was appointed because there were disputes about possession between three different groups of properties each one was claiming to be in possession i.e. the plaintiff, the defendant nos. 1 to 27 i.e. Koli group and the defendant no. 29. In so far as the plaintiff is concerned, the said witness in his cross-examination deposed that there were seven agreements executed by plaintiff and Srinath Builders . In paragraph 21 he has deposed that possession of the land has been handed over to him by Koli family and the same is proved with the help of the Commissioner's report. In paragraph 29 of the evidence, he has deposed about the report of the Commissioner. The report disclosed that he is in possession of the said property. This evidence is a common evidence both in respect of the suit and LAR No. 3 of 1997. All the three parties who are claiming their respective rights in the properties have also filed documentary evidence.

31. The documentary evidence produced before me can be analysed in brief as under :-

32. The plaintiff has produced at Exhibit P-1 to P-52 and P-50 to P-61 various documents. This contain four agreements which the plaintiff is supposed to have entered into with the defendants nos. 1 to 27 for purchase of the suit property. It also contains the details about the payments which the plaintiff is supposed to have paid to the defendant as and by way of consideration towards the suit agreement. It also contains documents which the plaintiff has produced being the agreement entered into with the defendant no. 28. It also contains the public notice issued in Mumbai Samachar dated 13.7.1984 and the correspondence which has been exchanged by and between the parties in respect of the purchase of the suit property. The plaintiff has also produced the ULC proceedings in respect of the suit property under which sale permission is granted. The ULP proceedings are in the name of the defendants. The plaintiff has further produced suit proceedings in Suit No. 6908 of 1985 and the documents which are filed in the course of the said proceedings. The plaintiff has also produced the copies of 37EE forms and acknowledgement and the certificate issued by the Income-tax authorities dated 22.1.1987 under Section 269 F of the Income Tax Act. The plaintiff has also produced the deed of indemnity. Exhibit P-51 is the draft statement under Section 82 of the Income-tax Act. The defendants have on the other hand produced three

agreements dated 29.4.1985 being Exhibits D-1 to D-3 in respect of three portions of the plot of land which has been purported to have been sold by the defendant to the plaintiff herein. These three documents being Exhibits D-1 to D-3 are in variance with the documents which are produced by the plaintiff being Exhibit P-20, P-21, P-23 and P-25 all dated 29.4.1985 in respect of the said three plots of land. The defendants have also produced the various receipts issued by Bombay Intelligent Security Force and the two receipts of payment. Even these receipts are produced to show that the property was in the hands of the defendants and the defendants have been protecting the said property through employment of security guards and therefore, they are in possession. The Defendant No. 28 has also filed large amount of documentary evidence. He has produced the Commissioner's report and copies of various agreements being Exhibits C-3 to C-9 being seven agreements entered into by and between Srinath Builders, defendant no. 29 and the plaintiff herein and also relied upon 28 agreements which the defendant no. 29 is supposed to have entered into with the Koli family who are the defendants herein. The defendants have also relied upon the various payment receipts and possession letter dated 22.12.1992 which has been executed by the defendant to the plaintiff and the same is Exhibit C-47. The defendant no. 28 has also produced Exhibit C-64

which is an affidavit in the course of the proceedings of Notice of Motion No. 1099 of 1993 filed by one D.R. Suchi and another affidavit of the defendant dated 11.11.1993 being Exhibit C-65. The defendant no. 28 has also produced Exhibits being C-47 which is a letter of possession executed by the defendants. On the basis of the aforesaid documentary evidence and the oral evidence I am required to consider the rival submissions made by the parties. Though in the present suit large number of issues are framed, I find that basically the points which are required to be determined is whether the plaintiff is entitled to specific performance of all the said four agreements and if so whether he is entitled to compensation amount which he has received. If the plaintiff is not entitled to the specific performance of the property then whether the defendants are entitled to the compensation and whether the defendant no. 29 by virtue of entering into agreement for sale with the parties and being in possession is entitled to any amount towards the said compensation. The plaintiff has not pressed issue nos. 1, 2 and 3. As far as issue no. 4 is concerned, i.e. whether the plaintiffs are required to give up their claim in respect of the acquired land pertaining to Land Acquisition Reference No. 3 of 1997 in view of the provisions of Section 12(3) of the Specific Relief Act, the issue as such is required to be considered

in a slightly different context.

33. The present suit is filed for specific performance under four agreements. For convenience sake the said plot of lands covered by the agreements will be hereinafter referred to as plot nos. 1, 2, 3 and 4. In so far as plot no. 'A' is concerned, i.e. covered by agreement for sale dated 6.7.1984 being Exhibit P-2 to the plaint. The other three agreements are agreements dated 29.4.1985. These three agreements are in respect of three plots of land. Before dealing with the agreement pertaining to plot no. 1 dated 6.7.1984 I would consider the arguments in respect of three agreements i.e. agreements all dated 29.4.1985. The plaintiffs have produced all the three agreements as being Exhibits P-21, P-23 and P-25. The defendants have also produced the very same agreements all dated 23.4.1985. The agreements which are produced by the defendants nos. 1 to 27 are marked as Exhibits D-1, D-2 and D-3. This set of agreements pertains to plot nos. B, C and D. All the three agreements produced by the plaintiff as also all the three agreements produced by defendant nos. 1 to 27 are proved documents and are on record. Though the said agreements pertain to the said plots of land there is material difference in the agreements produced by both the plaintiffs and defendants nos. 1 to 27. The material

differences are that the agreements which are produced by the plaintiff the price is mentioned as Rs. 205 per sq. yard whereas the agreements which have been produced by defendant nos. 1 to 27 mentions the price as Rs. 285 per sq. yard. Thus, there is the total price variance in case of the agreements which are produced by the plaintiff and in case of the agreements which are produced by the defendants. Even the terms and conditions of the payment are also in variance with each other. In case of the agreements which are produced by the plaintiff the defendants nos. 1 to 27 are required to make out a good and marketable title whereas the agreements which are produced by the defendant nos. 1 to 27 it has been provided that the purchaser purchased the property in the same condition in which they are on 'as is where is basis' and a declaration is given that the vendors i.e. defendant nos. 1 to 27 have not created any encumbrance in respect of the said property. Under clause 7 of both the agreements the time to complete the sale is provided as 24 months but in the agreement which has been produced by the plaintiff the time of 24 months has to be counted from the receiving of the money mentioned in clause 2 (b) thereof whereas under clause 7 time of 24 months has to be counted from the vendors making out marketable title. The agreement produced by the plaintiff provides that the purchaser to obtain the NOC from

the competent authority whereas no such clause is in the agreements produced by defendant nos. 1 to 27. Even in respect of possession there is variance of the provisions provided in both the agreements. Thus, I find that the agreements which are produced by the plaintiff and the agreements which are produced by the defendant pertaining to the same property and of the same date are in material difference with each other. The question, therefore, arises which are the agreements in respect of plot nos. B, C and D a specific performance even if I am inclined to grant should be granted. The plaintiffs have contended that the agreements which are produced by them being Exhibits P-21, P-23 and P-25 are the correct agreements and in respect of which the specific performance should be granted. On the other hand, the defendants nos. 1 to 27 contended that the agreements Exhibits D-1, D-2 and D-3 are the agreements which are executed by and between the plaintiff and the defendants and even if this Court comes to the conclusion that a specific performance should be granted then it should be only in respect of those agreements which are produced by the defendants nos. 1 to 27.

34. In support of the aforesaid contention, the learned counsel for the plaintiff has contended that the agreements which are produced by the plaintiffs are the valid and the correct agreements

and the agreements which are produced by the defendants are not to be acted upon. It has been contended by the learned counsel for the plaintiff that it is the agreements at Exhibits P-21, P-23 and P-25 are not the only agreements which have been validly executed but have been acted upon by the parties. It has been contended by the learned counsel for the plaintiff that in view thereof it is only these agreements at Exhibits P-21, P-23 and P-25 are required to be accepted and specific performance should be granted. The learned counsel for the plaintiff has in support of the aforesaid contention contended that the defendants have received the earnest money in accordance with Exhibits P-21, P-23 and P-25 and the same has been admitted by the defendants nos. 1 to 27 in the course of the evidence. It has been further contended that after entering into the agreements dated 29.4.1985 on 12.12.1985 Form No. 37 EE under Section 269 B (2) of the Income-Tax Act, 1961 has been filed in which the rate mentioned is at the rate of Rs. 205 per sq. yard and not Rs. 285 per sq. yard. It has been further contended that Exhibits P-21, P-23 and P-25 have been signed by Motiram Koli and Gopinath Koli both whereas Exhibits D-1, D-2 and D-3 are signed only by Motiram Koli. It has been further contended that even the settlement of the claim of Bhaidas Bhuta, lessee Balaji Construction and sub-lessee M/s. Aurum

Pharmaceuticals Pvt. Ltd. has been settled in terms of the agreement Exhibits P-23 and P-25. It has been contended by the learned counsel for the plaintiff that both the parties agreed that though the agreements Exhibit D-1, D-2 and D-3 all the three agreements dated 2 29.4.1985 as produced by defendant nos. 1 to 27 the same were not to be acted upon and were required to be destroyed.

35. It is now well settled that the relief of specific performance is a discretionary relief and the Court ought not to exercise the discretion where a party comes to the Court seeking such relief with unclean hands. The plaintiffs have filed the suit based on a very same agreements dated 29.4.1985 which are Exhibits P-21, P-23 and P-25. At no point of time in the plaint or in his examination-in-chief the plaintiff however disclosed that there were there other set of agreements at Exhibits D-1, D-2 and D-3 also dated 29.4.1985 and that they were agreed not to be acted upon. It is only in the cross-examination he is being confronted with the agreements dated 29.4.1985 as produced by the defendant nos. 1 to 27 being Exhibits D-1, D-2 and D-3 that the plaintiff started putting forth a false and bogus plea that the agreement was not to be acted upon. It is clear from the evidence that the transactions between the parties has not been as reflected in Exhibits P-21, P-23 and P-25. To

accept the contention of the defendant nos. 1 to 27 that the documents produced at Exhibits D-1, D-2 and D-3 have been given a go-by is to hold that the defendant nos. 1 to 27 has given up a better offer which has ben reflected in the agreement produced by them wherein it is inter alia provided that the price at which the property is sold is Rs. 285 per sq. yard and not Rs. 205 per sq. yard. There is no explanation forthcoming from the plaintiff that why a party would refuse to abide by the agreement which is more beneficial to him than those proposed by the plaintiff herein. The conduct on the part of the plaintiff in deliberately suppressing the important material document which has been produced by the defendant nos. 1 to 27. The cross-examination of the plaintiff pertaining to the agreement indicating the price of Rs. 285 per sq. yard is itself sufficient to disallow the relief of specific performance in favour of the plaintiff herein. In my opinion plaintiff is not entitled to specific performance of the agreements dated 29.4.1985 in respect of plot nos. B, C and D being Exhibits P-21, P-23 and P-25. Even otherwise on merits, I am of the opinion that this is not a fit case in which the discretion should be exercised in favour of the plaintiff on merits. It is well settled that a performance of the agreement can be granted only if there is no ambiguities in the terms and conditions of any of the agreements between the

parties. It is well settled law that the terms and conditions of the agreements between the parties must be at ad idem. But what I find on record and the material produced before me that there are variance of the terms and conditions in Exhibits P-21, P-23 and P-25 on the one hand and Exhibits D-1, D-2 and D-3 on the other hand. The variance is of material nature. Variance pertains to the terms and conditions of the agreement which are most material. The terms and conditions of the agreement such as price, such as marketability of the land, such as the possession to be handed over and such as completion of the agreement between the parties. In such an event, in my opinion it is not possible to grant specific performance of the agreement merely because the plaintiff has produced documents i.e. agreements Exhibits P-21, P-23 and P-25. The learned counsel for the plaintiff has contended that the subsequent conduct of the defendant nos. 1 to 27 indicates that the defendants nos. 1 to 27 have acted on Exhibits P-21, P-23 and P-25 and not on Exhibits D-1, D-2 and D-3. Though the same aspect is not very significant, in my opinion, however, even considering the said aspect, I find no material in support thereof. The reliance on Form No. 37EE executed under Section 269 B of the Income-Tax Act, 1961 is indicating the price of Rs. 205/- cannot be accepted particularly because the defendant nos. 1 to 27 are illiterate and obviously the signatures

are obtained in blank and filled in subsequently. If the plaintiff can obtain from the defendant nos. 1 to 27 two sets of agreements i.e. Exhibits P-21, P-23, P-25 and Exhibits D-1, D-2 and D-3 then there could be no surprise when in the form 37 EE is mentioned the price of one set of agreement between the parties. I am of the opinion that in such circumstances and on such material and evidence produced before this Court on evidence, it is not possible to accept the contention of the plaintiff that two sets of agreements were executed and it was later agreed to destroy one set of agreements and retain one set of agreements. Thus, I hold that even on merit, the plaintiff is not entitled to specific performance of the agreement in his favour pertaining to plot B, C and D covered by the said three agreements dated 29.4.1985. Thus, in so far as this part of the case is concerned, I hold that the plaintiff is not entitled to specific performance of the agreements and thus consequently the suit in respect of the aforesaid agreements must necessarily fail.

36. Now this takes me to the fourth agreement which is the material agreement which pertains to plot A. In so far as this agreement is concerned, there is admittedly only one agreement and there are no two sets of agreement. The learned counsel for defendant nos. 1 to 27 however has contended that

the price mentioned in the agreement in respect of plot no. 1 is 205 per sq. yard. It has been contended that in light of the Exhibits D-1, D-2 and D-3 it should also be held that the agreement between the parties is not as indicated by the agreement dated 6.7.1984 which is Exhibit P-2 on record. I am not inclined to accept the contention of the learned counsel for defendants nos. 1 to 27 that merely because in this agreement dated 6.7.1984 price mentioned is as Rs. 205 per sq. yard whereas in Exhibits D-1, D-2 and D-3 the price mentioned is Rs. 285/- per sq. yard, this agreement must fail. It is possible that in respect of the very plot of land the party can agree to a different price mechanism or a different price depending upon the area of the land, location of the land and the nature of the land. In that view of the matter, it is not possible to accept the aforesaid contention.

37. The learned counsel for defendant nos. 1 to 27 has thereafter contended that the plaintiff is not entitled to specific performance of the agreement dated 6.7.1984 because it is the plaintiff who has committed breach of the said agreement. It has also been contended by the learned counsel for the plaintiff that such agreement ought not to be permitted to be specifically preformed because the defendant nos. 1 to 27 are illiterate and they have never accepted the terms and conditions of the said

agreement. Even the aforesaid contention is required to be rejected because on the record and the material produced, it is not possible to accept that the defendant nos. 1 to 27 have signed the said agreement without understanding the terms and conditions thereof. Merely because they are illiterate it cannot be held that the defendant nos. 1 to 27 are not bound by the agreement dated 6.7.1984. As against that it is also relevant to note that defendant nos. 1 to 27 have also entered into an agreement with defendant no. 29 independently and he is claiming his own right in the property keeping in mind the aforesaid fact, it is not possible to hold that the defendant nos. 1 to 27 have signed the agreement without understanding the implication of the terms and conditions thereof.

38. The next contention advanced by the learned counsel for defendant nos. 1 to 27 is that the agreement is not binding on them because the plaintiff committed a breach by not making payment on its due date as provided under the said agreement. The relevant payment clauses are set out hereunder :-

> 1. The Vendors shall sell and the Purchasers shall purchase from the Vendors their right title and interest in

the said property more particularly described in the First Schedule hereunder written free from all encumbrances at the price to be calculated at the rate of Rs. 205/- (Rupees two hundred five only) per square yard on actual admeasurement to be determined on joint survey less the price which the Purchaser shall pay to the legatees of the deceased Bhaidas Dharsi Bhuta and M/s. Aurum Pharmaceuticals Pvt. Ltd., for the purchase of their right, title and interest in the said land.

2. The Vendors and the purchasers shall get the area of the said land admeasured by joint survey and the actual price payable shall be determined on the basis of the area on such joint survey. However according to the documents the said property admeasures 6761 square yards and the price payable for the same at the said rate would be Rs. 13,86,005.00. The Purchaser shall pay the fees of such joint survey.

3. The Purchasers shall pay to the Vendors the total purchase price as may be determined on such joint survey in the

following manner.

(a) A sum of Rs. 1,20,000.00 as earnest money or deposit to be aid on or before the execution of these presents.

(b) Rs. 2,50,000 on 6th day of January 1985

(c) Rs.2,50,000 on 6th day of July 1985

(d) Rs.3,00,000 on 6th day of January 1986

(e) Rs.3,30,000 on 6th day of July 1986 or at the time of formal possession.

(f) The balance at the time of execution of the sale Deed as herein provided.

It has also been contended that there is discrepancy in respect of the area of the land which has been mentioned. It has ben contended that in Exhibits D-1, D-2 and D-3 the area of the land is mentioned as 6781 sq. yards whereas in Schedule the area of the land is mentioned as 8361 sq. yard. It has been contended that the price of Rs. 205 per sq. yard has to be computed on the basis of the area of the land which has been mentioned in the said agreement produced by defendant nos. 1 to 27. That

in view of the different area mentioned in clause 2 and the schedule to the said agreement, it is not possible to compute what should be the area and thus what should be the total consideration for the sale of the said land. It has been thus contended that the specific performance cannot be granted when there is such vagueness in respect of the area of the land. Consequently, the price which has been payable by the plaintiff to the defendants nos. 1 to 27. In support of the aforesaid contention, the learned counsel for the defendant nos. 1 to 27 has relied upon clause 2 and the schedule of the said agreement which has been set out herein.

> "ALL THAT piece or parcel of land bearing survey No.101, Hissa No. 2 (part), C.S. No. 702 (part), admeasuring about 8361 square yards i.e. 6991 square metres or thereabouts together with premises, hereditaments and messuages thereon, situate, lying and being at Village Nahur, Taluka Kurla, B.S.D. Bombay in the Registration District and Sub-District of Bombay City and Bombay Suburban."

39. In so far as the aforesaid contentions are concerned, the learned counsel for the plaintiff

has contended that the plaintiff has committed no breach of the terms and conditions of the agreement and the plaintiff is entitled to the specific performance. In so far as the area is concerned, the learned counsel for the plaintiff has contended that clause 2 itself provides that the area mentioned therein is 8361 sq. yards is the tentative area mentioned and the amount is payable on the determination on a joint survey and the actual price will be payable on the basis of the land admeasured on such joint survey. Alternatively it has been contended that the total price payable has to be payable on the basis of the schedule mentioned to the said agreement because it is now settled law that the description of the property and the area of the property mentioned in the schedule if in conflict with the clause no. 2 of the said agreement then the schedule must take precedence to clause no. 2 of the said contract. In the light of the conflict between the clause and the schedule mentioned in the said agreement it is clear that the schedule must take the precedence and the area must be accepted as 8361 sq. yards.

40. On considering the aforesaid argument if the area mentioned is 8361 then the amount would come to Rs. 17,14,005 even at the rate mentioned therein of Rs. 205 per square yard and if the area is 6761 sq. yards the as mentioned in clause 2

thereof, the amount will come to Rs. 13,86,005. The learned counsel for the plaintiff has contended that even if the amount is taken as Rs. 17,14,005/- then also the plaintiff has complied with the terms and conditions of the agreement and the plaintiff is entitled to specific performance of the said agreement.

41. Thus, the arguments of both the sides are dependent upon the price payable in respect of the said land and the time on which the said payment ought to have been made. Clauses 1 and 3 of the said agreement inter alia provides that a sum of Rs. 1,20,000/- to be paid as earnest money; Rs. 2,50,000/- on 6.1.1985; Rs. 2,50,000/- on 6.7.1985, Rs.3,00,000/- on 6.1.1986, Rs. 3,30,000/- on 6.7.1986 or at the time of possession to be handed over and the balance price to be payable on the execution of the sale deed. The defendants have relied upon the payments which are set out in Exhibit G to the plaint and the said payment has been reiterated in the oral evidence led by the plaintiff of his witness Mr. Shethia. Turning to Exhibit G to the plaint and considering the arguments in respect of the same, it does show 36 payments totalling to Rs. 13,44,381/-. In so far as the payments which are concerned to Gopinath Koli, there is no dispute raised between the parties at all. The payments made to Gopinath Koli is Rs.

4,78,000/-. However, the disputes are raised by the defendant nos. 1 to 27 in respect of the payments made by the plaintiff to the legatees of Bhaidas Bhuta and Aurum Pharmaceutical Private Limited and other miscellaneous expenses alleged to have been incurred by the plaintiff as mentioned in Exhibit G to the plaint. Now considering the dispute pertaining to the payment to the legatees of Bhaidas Bhuta and Aurum Pharmaceuticals Private Ltd., is concerned, the learned counsel for the plaintiff has relied upon clause 1 of the said agreement which says that the price which has been payable will be reduced by the amount which will be paid by the plaintiff to the legatees of the deceased Bhaidas Bhuta and M/s. Aurum Pharmaceutical Pvt. Ltd.,for the purpose of purchase of their right, title and interest in the said land. It is the case of the plaintiff that pursuant to the said clause 1 of the agreement the plaintiffs have acquired the right, title and interest of the legatees of Bhaidas Bhuta and Aurum Pharmaceutical Pvt. Ltd,. and has made diverse payments as mentioned in Exhibit G to the plaint. It has been further contended that these payments are made under clause 1 of the said agreement and thus they are entitled to the deduction of the price which is payable by them to the said legatees of Bhaidas Bhuta and Aurum Pharmaceutical Pvt. Ltd., In support of the aforesaid contention, the learned counsel for the

plaintiff has produced in the evidence the proceedings which are filed against Bhaidas Bhuta and his legatees as well as produced the agreements which have been entered into by the plaintiff with late Bhaidas Bhuta being agreement dated 13.2.1985 between Damodardas B. Bhuta and the plaintiff being Exhibit P-5 and agreement dated 13.2.1985 between Aurum Pharmaceuticals Pvt. Ltd., and the plaintiff being Exhibit P-6. He has also relied upon an agreement dated 29.3.1986 between Damodardas B. Bhuta and the plaintiff. Further agreement for sale dated 29.7.1987 between Damordardas B. Bhuta and the plaintiff being Exhibit P-28 and the third agreement for sale between Damodardas B. Bhuta and the plaintiff dated 19.11.1987 being Exhibit P-29. Agreement Exhibit P-30 between Balaji Construction Corporation and the plaintiff dated 26.7.1986, agreement for sale dated 28.12.1987 between M/s. Balaji Construction Corporation and the plaintiff being Exhibit P-31 and the agreement for sale dated 19.11.1987 between Balaji Construction Corporation being Exhibit P-32. He has also relied upon one more agreement Exhibit - 33 between Amubhai Velji Shethia and the plaintiff dated 18.4.1986 being Exhibit P-33. It has been also brought on record that there were certain litigations also initiated by filing a suit being High Court Suit No. 340 of 1987 and ultimately consent terms are filed in the said suit on 22.7.1981. The learned counsel for the

plaintiff by relying upon the aforesaid documents and agreements and clause 1 of the said suit agreement in respect of plot of land no. 1 has contended that the payments made by the plaintiff to the said M/s. Aurum Pharmaceuticals Pvt. Ltd., and the legatees of Bhaidas Bhuta must be given a credit while computation of price paid in respect of the said agreement. Taking into account the other payments which are made by the plaintiff to the said Bhaidas Bhuta and others the total payment comes to a sum of Rs. 11,76,880. In my opinion the aforesaid payments are made by the plaintiff to satisfy the claim of the various parties including original owner of the land. This payment was required to be made to make the title of the property marketable and the plaintiff was authorised to do so under the terms and conditions of the said agreement and therefore these payments made Bhaidas Bhuta's legatees and to M/s. Aurum Pharmaceuticals Pvt. Ltd., have to be treated as payments made towards the consideration stipulated under the said agreement and the plaintiff is entitled to the credit thereof.

42. However, when it comes to other miscellaneous payments of which credit has been sought being Rs. 15,000/- towards court fee, Rs. 1,000/- to V.L. Damle, Rs. 15,000/- to Rohidas Patil, Rs. 10,000/- to Shantaram Mhatre, Rs.

30,000/- to Dina Ulvekar and Rs. 5000/- to M.K. Nesari, Advocate. The learned counsel for the plaintiff has contended that these are the expenses which are incurred for the purpose of acquiring the rights of Aurum Pharmaceuticals Pvt. Ltd, and the legatees of Bhaidas Bhuta and, therefore, they are entitled to claim the set off of the said amount also towards the purchase price payable in respect of the suit property. I am unable to accept the contention that these payment must be given credit for as they are not payments related to any of the clauses of the agreement dated 6.7.1984. In my opinion, once the amount is not specifically provided for as payable by the plaintiff on account of the defendants, it is not possible that any payments made by the plaintiff must necessarily be given credit to in respect of the purchase price of the sale of the said land. The learned counsel for the plaintiff has however purportedly raised a theory of oral agreement between the plaintiff and Gopinath Koli in respect of the said payments. But I am unable to find any such oral agreement for the aforesaid payment to be accepted as the price towards the consideration of the agreement for sale. In any event, in view of the terms and conditions of the agreement for sale dated 6.7.1984 being in writing the question of accepting any oral agreement contrary to the said terms and conditions of such written agreement cannot and does not arise and I am

therefore, unable to accept the aforesaid contention. I, therefore, do not allow the credit in respect of the aforesaid payment made to various third parties by the plaintiff towards the agreement for sale in the present case.

43. Now turning to the terms and conditions of the agreement for sale under clause 3 the plaintiff was liable to give payment in all totalling to a sum of Rs. 12,50,000/- as contemplated under clause 3 of the said agreement leaving behind the balance price payable on completion of sale. Admittedly, as against the same, a payment of Rs. 11,76,880/- is made after taking into consideration the payment made to Bhaidas Bhuta and Aurum Pharmaceuticals Pvt. Ltd., However, the plaintiff has tendered the payment of Rs. 3 lacs under a cover of the letter dated 30.1.1993 being Exhibit P-55. It has been contended by the learned counsel for the plaintiff that considering that a sum of Rs. 11,76,880/- has already been paid and a sum of Rs. 3 lacs having been sent under the cover of letter dated 30.1.1993 it should be accepted that the plaintiff has performed his part of obligation and in any event was always ready and willing to perform his part of the obligation. In so far as the balance amount is concerned, it has ben contended by the learned counsel for the plaintiff that that was due and

payable only on the completion of the agreement under clause 3 (f) of the said agreement and that was payable only on the completion of the sale which has yet not been done. It has been further contended by the learned counsel for the plaintiff that the plaintiff was always ready and willing to complete his part of obligation by making payment of the balance amount at the time of execution of such sale deed. On the other hand, the learned counsel for the defendants nos. 1 to 27 has contended that the plaintiff has committed breach of the terms and conditions of the agreement. Firstly it has been contended that even if the dates as mentioned in Exhibit G to the plaint is taken into consideration and if it is looked at on the basis of the schedule of the payment provided in the schedule to the agreement, it is clear that the plaintiff has failed and neglected to make payment on its due dates as provided in clause 3 thereof. It has been further contended that in the light of such admitted defaults the plaintiff is not entitled to specific performance of the said agreement. It is further contended by the learned counsel for defendant nos. 1 to 27 that even under the instalment clauses 3 (a) to (e), the total amount payable is Rs. 12,30,000/- whereas the amount paid is only Rs. 11,76,880/- and not Rs. 12,50,000/- and, therefore, the plaintiff is not entitled to specific performance of the said agreement. The purported so called payment of Rs.

3 lacs according to the learned counsel for defendant nos. 1 to 27 ought not to be taken into consideration because the said amount is tendered by a letter dated 30.1.1993 i.e. almost after seven years of the last instalments being clause 3 (e) and, therefore, it should not be accepted. Although the learned counsel for the plaintiff has contended that by a later agreement it was agreed between the parties that the last instalment under clause 3 (e) will be paid only on receipt of the ULC permission. The permission of the ULC is received on 13.7.1992 and the certified copy thereof was received on 24.8.1992 and, therefore, the payment of the amount on 30.1.1993 should be accepted as a payment in time in so far as the amount payable under clause 3 (e) of the said agreement is concerned.

44. It has also been contended by the learned counsel for the plaintiff by relying upon various judgments that the time to make payment is not the essence of the contract because the agreement does not specify that time is the essence of the contract. Furthermore, it has been contended that the plaintiff having accepted the payments subsequent to the due dates, the plaintiff is not entitled to question the delay in payment as the plaintiff by its own conduct has accepted that time is not the essence of the contract. It has ben contended that under section 55 (3) of the Contract

Act it was upon the defendant nos. 1 to 27 to make the time an essence of contract and claim due compensation. However, the defendants nos. 1 to 27 have not done so and therefore plaintiff is entitled to specific performance of the said agreement. It has been further contended that they are not also entitled to payment of any amount towards interest. In support of the argument that time is not the essence of the contract, the learned counsel for the plaintiff has relied upon the judgment of the Bombay High Court in the case of Smt. Swarnam Ramachandran and another vs. Aravacode Chakungal Jayapalan, reported in AIR 2000 Bombay 410, particularly on para. 14 thereof which reads as under :-

> "14. The law on the point is well settled. Ordinarily, time is not the essence of a contract for the sale of immovable property. The parties in a given case, may make time of the essence either expressly in terms which unmistakably provide unmistakably that they intended to do so. Alternately, making of time as the essence of a contract may be inferred from the nature of the contract, the property or the surrounding circumstances. A mere stipulation in a contract laying down the time for performance is not sufficient to

make time the essence of a contract for sale of immovable property. A party to a contact cannot by his unilateral act make time of the essence unless the circumstances are such as would establish that the other party to the contract had delayed or defaulted in the performance of his obligations under the agreement."

Thereafter he has relied; upon the judgment of the Calcutta High Court, in the case of Ghyasuddin Ahmed vs. Md. Ismail and another, reported in AIR (33) 1916 Calcutta 521, particularly head note (2) which reads as under :-

"(2) No doubt B failed to make payment at the stipulated time but as A had been all along very lenient in enforcing payment of instalments it could not be held that any particular default or defaults could terminate the contract except upon express notice to that effect which was not given by A. The contract therefore was subsisting."

It has been contended by relying upon the aforesaid judgments that the time is not the essence of the contract and thus the plaintiff is entitled to the specific performance of the agreement even if they

have not made the payment on its due date as mentioned in clause 3 of the agreement. I am unable to accept the aforesaid contention of the plaintiff that the plaintiff is entitled to specific performance of the said agreement dated 6.7.1984. Not only that there was a breach of the terms and conditions of the agreement by the plaintiff particularly of the clause 3 thereof, but also the payment which has been relied upon by the plaintiff in support of the aforesaid argument also can not be accepted toward the consideration of the suit agreement. Exhibit G in which the payments are set out by the learned counsel for the plaintiff is the payment in respect of four agreements. Under the other three agreements the payments supposed to have been made by the plaintiff is of the various amounts of Rs. 20,000/- Rs. 20,000/- and Rs. 55,000/- each of which are set out in items 6, 7 and 8 of Exhibit G. This payment is towards the payment of the earnest money under each of the said agreement. If this amount is taken out from the total calculation then there will be a serious breach of clause 3 of the said agreement dated 6.7.1984 which even if this amount is accepted indicates that the payments are not made by the plaintiff in accordance with clause 3 of the agreement dated 6.7.1984. The plaintiff has however contended that in an event if this Court comes to the conclusion that the plaintiff is not entitled to specific performance of

the agreement of plot B, C and D, covered by the three agreements dated 29.4.1995 being Exhibits P-21,, P-23 and P-25 and Exhibits D-1, D-2 and D-3 then this payment should be considered as the payment towards the agreement dated 6.7.1984. I am of the opinion that law does not permit such a course. The plaintiff wants to shift the payment under one agreement to another agreement merely in case the Court coming to a conclusion that the plaintiff is not entitled to specific performance. Now, this payment of Rs. 95,000/- was not in respect of the agreement dated 6.7.1984 even on the date of the suit Exhibit G indicates the payment made not in respect of the aforesaid agreement but it is in respect of all four agreements. Thus, the plaintiffs themselves never apportioned the said amount of Rs. 95,000/- towards the suit agreement even on the date of the suit and even till hearing thereof but merely on alternatively it is contended that in the event of the Court coming to the conclusion that the plaintiff is not entitled to the specific performance of the agreements at Exhibits P-21, P-23 and P-25 this amount should be shown towards the payment of the suit agreement. I am not inclined to accept the aforesaid contention. If the payment is towards the said agreements being Exhibit P-21, P-23, and P-25 then merely because of refusal of specific performance thereof it is not permissible to transfer the said amount to another

agreement in respect of plot A towards the agreement for sale dated 6.7.1984. I am required to consider the case as on the date of the suit and as the same is laid before the Court by the plaintiff in the plaint and cannot subsequently by mere argument accept the argument of transfer of the amount from one account of the agreement for sale to another account of agreement for sale. Thus, I am of the opinion that the plaintiff has not complied with the terms and conditions of clause 3 of the said agreement dated 6.7.1984. Even if I accept the contention that the time is not the essence of the contract still even as on the date of the suit and even till today there is a breach of the terms and conditions of the agreement. The argument that the payment made of Rs. 3 lacs must be accepted as if the plaintiff was ready and willing to comply with the said agreement cannot be accepted. There is no material or evidence produced that at any time there was variance to clause 3 of the agreement so as to hold that the payment has to be only after the ULC permission is received by the plaintiff in so far as the agreement dated 6.7.1984 is concerned. The contentions raised in letter dated 30.1.1993 are vague and baseless. There is no material or evidence in support of the said contention. In the present case I am of the opinion that unless there is an agreement in writing modifying the agreement dated 6.7.1984 the oral variance of the said

agreement cannot be accepted. In any event on the material evidence produced before me, I am of the opinion that the plaintiff has failed to establish any such written agreement for postponement of the amount payable on due date as claimed and contended by the plaintiff. Furthermore on the evidence on record it is clear that by non-payemnt of amount as stipulated under clause 3 of the agreement the plaintiff is in breach of the terms of the agreement. Once an amount paid towards the earnest money in respect of the agreement for sale for plots 'B', 'C' and 'D' is segregated from Exhibit 'G' and the payments made towards miscellaneous items such as court fees, advocates fees, etc., are not taken into account towards the payment of consideration in respect of plot 'A' then there are serious breaches of the agreement by the plaintiff in complying terms and conditions of the said agreement being plot of land 'A' covered by the agreement dated 6.7.1984. I, therefore, hold that the plaintiff is not entitled to specific performance of the agreement dated 6.7.1984 as the plaintiff has failed to comply with his obligation thereunder. I further hold that the plaintiff was never ready and willing to comply with his obligation under the agreement dated 6.7.1984. I further hold that the plaintiff has failed to make payment as per the time schedule prescribed as per clause 3 of the said agreement and thus the plaintiff is not entitled to the specific

performance thereof. I, therefore, hold that the plaintiff is not entitled to specific performance of any of the four agreements which have been the subject matter of the suit and thus the plaintiff's suit is liable to be dismissed.

45. In fact once I have held that the plaintiff is not entitled to specific performance of any of the four agreements the only question remains that whether the plaintiff is entitled to any portion of the compensation in respect of the land acquired by the State Government by virtue of he being put in possession of the said property by virtue of the fact that he is in possession of the said property. In so far as this contention is concerned, firstly it has to be considered whether the plaintiff was in possession or not as on the date of the notification issued under Section 126 of the Maharashtra Regional Town Planning Act, 1966. Before me the plaintiff has claimed that they are in possession of the property. The defendant nos. 1 to 27 has claimed that they are in possession of the property as the owners thereof and the defendant nos. 29 has also claimed possession in respect of the said property. In so far as the defendant no. 29 is concerned, it is the case of the defendant no. 29 that the defendant had entered into seven agreements with the plaintiff in respect of plot nos. 3 and 4 and also has entered into 35

agreements with the defendant nos. 1 to 27 in respect of the remaining portion of the land. However, the plaintiff has not filed any suit for specific performance and thus I am not required to consider the right of defendant no. 29 vice versa the plaintiff or right of defendant no. 29 vice versa the defendant nos. 1 to 27 under the aforesaid agreement for sale. The rights of defendant no. 29 in respect of his agreement will have to be considered as and when occasion arises when the defendant no. 29 seeks specific performance of the said agreements. For the purpose of the present matter the only question required to be considered is whether the defendant no. 29 under part performance of the said agreement was put in possession of the said property and as such entitled to part of the compensation as levied by the Land Acquisition Officer. Thus, compensation amount deposited by the Land Acquisition Officer is required to be divided in two parts (i) claim of the persons in possession and the claim of the owners as owners of the said property. Having held that the plaintiff is not entitled to specific performance of any of the agreements as claimed in his suit and further that the defendant no. 29 having failed to file a suit for specific performance of any of the agreement in his favour, I am necessarily required to hold that the defendant nos. 1 to 27 are the owners of the property and being owners thereof are

entitled to the share of the compensation in respect of the acquired land by the State Government. In so far as the share of the compensation towards the possession is concerned, on the material record before me it has been established that it is the defendant no. 29 who has been in possession as on the date when the notification was issued and that clinching evidence which has been produced by the defendant no. 29 is the report of the Commissioner dated 25.8.1993. The said report of the Commissioner indicates that the defendant no. 29 is in possession of the said property. It seems that the plaintiff under the seven agreements and the defendant nos. 1 to 27 under 35 agreements had put the defendant no. 29 in possession of the suit property. There has been a possession receipt produced by defendant no. 29. Apart from the possession receipt the oral evidence of the plaintiff indicates that the plaintiff was not in possession of the property. The said relevant portion of the evidence is set out hereinunder :-

"Question: In your examination in chief, you have stated that deft. No. 29 was entitled to claim and/or be put in possession of the 3rd and 4th plots only after making payment to the plaintiffs as provided in the said seven agreements; can you point out where it is so set

out in the said agreements?

Ans. : After going through two of the agreements, I do not find any such clause in the agreements. Because I have not so stated in my examination in chief, it cannot be stated that my statement is false."

There has been possession letter on record being Exhibit C-46. The said possession letter when put to the defendants nos. 1 to 27 it has been deposed as under :-

> "11. ..... I will not be able to identify the signature of Hema Vahini. Unless I see the documents I will not be able to tell whether Draupadi Mandvikar is one of the signatory to the possession receipt. I will not be able to identify the signature of Draupadi Mandvikar unless I see the document. Similarly, I will not be able to identify the signature of other ladies of the Koli family. I will be able to identify signature of Gopinath, Kashinath and Motiram Koli."

The possession receipt is not disputed and is an

established document at Exhibit C-46. The contention however raised by the learned counsel for the defendant nos. 1 to 27 is that the 35 agreements in favour of the defendant no. 29 have been terminated and thus, the defendant no. 29 is not in possession of the suit property. Firstly, no such termination has been established. Secondly, even if it is so the document being the Commissioner's report dated 25.8.1993 Exhibit C-2 clearly establishes that the defendant no. 29 is in possession of the said property. I thus hold that the plaintiff is not entitled to any portion of the compensation amount covered by the Land Acquisition Reference No. 3 of 1997. But it is the defendant no. 29 who is entitled to the compensation as person in possession as on the date of the notification of the Collector under Section 126 (4) dated 28.9.1993.

46. However, the learned counsel for the plaintiff has contended that the plaintiff has no right, title and interest in the said property having not filed any suit for specific performance the plaintiff cannot relied upon his possession and claim compensation or any portion thereof. The learned counsel for the plaintiff in support of the aforesaid contention has relied upon the judgment of the Division Bench of this Court in the case of Mohammad Akil Khan v. Premraj Jawanmal Surana and

another, reported in AIR 1972 Bombay 217 particularly paras 4, 5, 8, 9 and 15 of the said judgment.

> "4. When this happened and when the Collector issued notice under Sec. 9 of the Land Acquisition Act requiring the parties to put in their claims to compensation for all interests in the land acquired. Claimant No. 1 appeared and put in his claim for the entire compensation. He claimed amount at the rate of Rs. 4,000/- per acre and further added that he had not lost his title at all, though a contract of sale was executed in favour of claimant No. 2. He was still the owner of the land and as such entitled to the entire compensation that may be determined by the Land Acquisition Officer. In the same proceedings, claimant No. 2 who had the contract of sale in his favour and which was frustrated due to the acquisition appeared and put in a claim to the entire compensation amount. According to him, not only there was a contract in his favour for the sale of the property acquired but he was put in possession thereof in part performance of the

contract. He was ready and willing to perform his part of the contract. In the circumstances his possession was protected under Section 53-A of the Transfer of Property Act and the vendor could not displace him from the property. This right of possession together with the right to obtain the sale-deed should be considered as amounting to almost full title and as such the entire amount of compensation should be paid to him.

5. So far as the inquiry under Section 9 of the Land Acquisition Act and the further making up of the award under Section 1 were concerned, the Land Acquisition Officer heard the parties and declared the true area of the land acquired and the total compensation which in his opinion was allowable for the land in terms of the provisions of Section 23. So far as the apportionment was concerned, as there was dispute between the claimants and the Land Acquisition Officer had no option but to refer the dispute to the court under Section 30 of the Act. He accordingly made a reference.

8. The first pint that was raised before us by Mr. Vaishnav on behalf of claimant No. 1 was that this was a case of contingent contract and would give no right whatsoever to claimant No. 2. He based his argument on the wording of the agreement, Ex. 57. He also argued that not only this was a contingent contract but possession was not delivered to claimant No.2 in part performance of the contract. Since claimant No. 1 as vendor had obtained an amount of Rs. 10,000/- which would be locked up for quite some time in view of the pending litigation instituted by Gesudarey Khan, possession was delivered to cover the interest that claimant No. 2 might have otherwise earned on this amount. He, therefore, argued that this was not a completed contract where possession was delivered in part performance of the contract. We find no substance in both these points.

9. Having gone through the entire wording of the contract, Ex. 57, in its original we find that the contracting parties have first described the property

that was agreed to be sold together with its boundaries. The price is then indicated as being Rs. 4,000/- per acre totalling upto Rs.1,20,000/-. The pertinent wording relating to the contract is that the vendor having agreed to sell the property at Rs.4000/- per acre has received under this contract Rs. 10,000/- as earnest money. It then recites that after the frivolous litigation of Gasudarey Khan comes to an end the sale-deed will be executed and the balance amount will be paid before the Sub-Registrar. At that stage claimant No. 2 will be not only made owner of the property but will be placed in possession thereof as such. The further recital shows that an advance of Rs. 10,000/- has been made to claimant No. 1 by claimant No. 2 and that the amount was likely to be locked up for some time. In order that the purchaser may not be put to loss in pursuance of this contract, possession is being handed over to claimant No. 2 for the time being. These are all the relevant recitals so far as the questions raised before us are concerned. A plain reading of this contract does not indicate that

the agreement itself depended upon the successful termination of the litigation started by Gasudarey Khan. A contract was made forthwith with all the terms being settled, but the execution of the document was postponed till the termination of that litigation. Simply because the time for performance of the contract is deferred, it does not make it a contingent contract. In the same manner even though the intention is to cover up the loss which may be occasioned to claimant No. 2 by payment of Rs. 10,000/- the recitals show that the possession was handed over in pursuance of this document Ex. 57. There is therefore no doubt that the description of the possession is a temporary possession or possession for the time being. The other recitals show that at the time of the execution of the contract, the possession was to be converted on the basis of full ownership. In a contract of sale, even though possession is delivered in part performance it does not become possession of an owner, as the contract by itself does not create any right in the land. We are, therefore, of the view that

neither of the points raised by Mr. Vaishnav has any substance."

"15. We have hardly any doubt that it must be assumed in the present case that the vendor and the vendee, viz., claimant Nos. 1 and 2 were willing to perform their respective part. Before, however, occasion arose to proceed further with the agreement, the State notified the property for acquisition on March 25, 1965. Not only that but after completing all formalities the possession was obtained on October 9, 1965. This determines all the private rights and completes the vesting of the property in the State for a public purpose. We have already pointed out earlier that the Civil Suit which was then pending came to a successful termination on November 3, 1965, whereby the rights to execute the sale-deed was exercisable within four months thereafter upto March 3, 1966. All this became impossible because the private ownership of the land came to be terminated on October 10, 1965. Undoubtedly, therefore, the contract of sale has been frustrated as it became impossible of performance. We have

already pointed out that a contract for the sale of immovable property is a contact that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Claimant No. 2 had while making this contact of sale also advanced a sum of Rs. 10,000/- by way of earnest. When the contract became frustrated due to the acquisition by the State, a situation arose where the mutual rights of the parties must be determined and settled. In our view, to a situation like this the provisions of Section 55 and more particularly sub-section (6) Cl. (b) would be attracted. Claimant No. 2 is undoubtedly a buyer and the expression 'buyer' as used in sub-section (6) of Section 55 also includes a person who has agreed to buy. So far as the buyer is concerned, sub-section (6) conceives of both the positions where the ownership is transferred to a buyer and where the ownership is yet to be transferred to him. Sub-clause (a) deals with a situation where the ownership of the property is passed to a buyer. As soon as that happens that buyer is entitled to

the benefit of any improvement in, or increase in value of the property, and to the rents and profits thereof. In other words, he is entitled to all the attributes of full ownership of the property. However, where the agreement is yet to culminate into transfer of ownership but where the buyer is willing to perform his part of the contract, his rights are indicated in sub-clause (b) of sub-section (6) of S. 55. The relevant sub-clause is as follows:-

"55 (6) (b): Unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission".

The clause quoted above, contemplated a case that a buyer shall not decline to accept delivery improperly. If he is willing to accept delivery of the property then he is entitled to charge on the property as against the seller and all persons claiming against him to the extent of seller's interest in the

property for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount. Where, however, there is good ground why the buyer should deliver (decline?) to accept delivery, he is also entitled for the earnest (if any) and for the costs (if any) awarded to him of a suit compel (sic) specific performance of the contract or to obtain a decree for its rescission. This statutory charge is created as soon as the buyer advances any part of the sale price or earnest to the seller. This charge is against the seller and all persons claiming under him to the extent of the interests of the settler in the property and also for the amount of purchase money properly paid. The property and the interest of the seller therein is in the nature of security for the purchase money properly paid, as also for the earnest amount. In the circumstances indicated in the above specific clause, the extent of the charge is not only confined to the purchase money properly paid and the earnest but also extends to the interest upon this amount. What is the nature of this

charge and how will it operate when the subject-matter of the contract has been acquired by the State and is no more available for going ahead with the contract? It appears that when the seller and buyer are both willing to perform their respective parts of the contract but the specific performance of the contract has become impossible by the unexpected interference by the State in acquiring the property, the relative rights between the parties would continue to be the same as under the T.P. Act. In other words due to the impossibility of the performance of the contract, the buyer will be entitled to recover from the seller any purchase money properly paid together with interest and also earnest with interest and to that extent he would have had under the statutory provisions quoted above a charge on the land. However, the land or the property is no more available to the parties as the State has acquired it and by deciding its compensation has converted the property into a sum certain. The property is in a sense transformed into the sum certain and the rights of respective parties would continue to be

> the same, in respect of this sum or the amount of compensation, which they had or which they would have had against the property. In other words the buyer would be entitled to claim from the compensation amount, which represents the converted form of property, his purchase money and earnest together with interest. It is in this sense that the buyer whose contract is now frustrated appears to have a claim or share in the compensation which becomes payable to the owner of the property by reason of the acquisition thereof."

It has been contended by relying upon the aforesaid judgment that the plaintiff is not entitled to any claim or compensation because the contract for sale of land in favour of the defendant no. 29 having been frustrated. On the other hand, the learned counsel for the defendant no. 29 relied upon the judgments in the case of Dossibai Nanabhoy Jeejeebhoy v. P.M. Bharucha, reported in 55 BLR 1208, Special Land Acquisition Officer (I), Bombay and Bombay Municipal Corporation (Labour), Bombay and another, reported in reported in 1993 Mh. L.J. 620, U.P. Jal Nigam, Lucknow through its Chairman and Anr. reported in (1996) 3 SCC 124, Mahadeo Nathuji Patil vs. Surjabai Khushalchand Lakkad and

others, reported in 1994 Mh. L.J. 1145, and Sunderlal v. Paramsukhdas, reported in 1968 SC 366 and has contended that on a true and correct interpretation the person who is in possession even if without any title is entitled to claim the portion of the amount of compensation money as and by way of possessory right. After considering the aforesaid judgements I am of the opinion that the defendant no. 29 being in possession of the said land under Section 53 A of the Transfer of Property Act is entitled to be continued in possession and is entitled to compensation for loss of possession of the said property. However, turning to the argument that what should be the ratio of the distribution of the compensation, the learned counsel have taken me through various judgments fixing the share of a person in possession from 10% to 50%. After considering all the judgments, I am of the opinion that this aspect is essentially a matter of fact to be determined on the basis of facts of each case. There is no hard and fast rule fixed that a portion or percentage have to be fixed in favour of a person in possession. Considering the fact that the defendant no. 29 is in possession is established from the record and evidence before me, I hold that the defendant no. 29 is entitled to the compensation at the rate of 30% of the compensation amount and the defendant nos. 1 to 27 would be entitled to the balance of the 70% of the

compensation amount because they are the owners in respect of the said land. From the material on record, I am of the view that the possession of the defendant no. 29 is merely in part performance of the agreement for sale. I am of the further opinion that in the light of the contention that the agreements have already been terminated. In that view of the matter the possession of defendant no. 29 can be characterised as a person in possession as trespasser. The defendant no. 29 has not filed any suit for specific performance. He has claimed possession only as a person in possession. Even if agreements of sale in favour of defendant no. 29 are valid, still it is well settled that the agreement for sale does not create any right, title or interest in the property and thus, the possession of defendant no. 29 cannot be considered as having any interest in the said property. I am, therefore, required to fix the ratio only on the basis of mere possession of the property by the defendant no. 29. In that view of the matter I have fixed the aforesaid percentage in the ratio of 30% for defendant no. 29 and 70% in favour of defendants nos. 1 to 27. I accordingly, hold that in so far as the suit is concerned, the suit is dismissed. In so far as the Land Acquisition Reference No. 3 of 1997 is concerned, I hold that the plaintiff is entitled to no part of the compensation whereas the defendant nos. 1 to 27 and defendant no. 29 are

entitled in the ratio of 70% and 30%. I answer the reference accordingly. Suit is dismissed.

47. The learned counsel appearing for the plaintiff seeks continuation of the interim order which was operative pending the suit. The order is of status quo. The order of status quo is continued for a period of three weeks from today. Similarly, the Prothonotary and Senior Master, High Court, Bombay, is directed not to hand over the money deposited in LAR 3 of 1997 for a further period of three weeks from today.